


Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

To: Julia D'Alesandro, Audit Dept.
From:  Brent Johnson, General Counsel
Re: Cash Bail held to Guarantee Appearance
Date: August 1, 2004

This memorandum is in response to your e-mail dated July 26, 2004 requesting an opinion on several cash bail issues. The first question is whether a court should hold cash bail indefinitely. In the circumstance that you described, a defendant is arrested and posts cash bail. The defendant then fails to appear, but the court does not forfeit the bail. You have stated that, in some cases, the bail has been held for two years.

The forfeiture of cash bail is generally discretionary. Utah statutes and rules are largely devoid of discussions of cash bail forfeiture. The court therefore has discretion to retain bail even though a defendant has failed to appear. Having said this, there does not appear to be a legal reason why the court should not forfeit the cash bail. Because the money is bail - posted to guarantee the defendant's appearance - the court can forfeit the bail and still pursue the defendant on the charges. If the court is able to find the defendant, the court could always credit the defendant's fine for the amount forfeited, but the court is not required to. Holding on to the bail does not seem to serve any purpose. The bail does not assist the court in ensuring the defendant's appearance, because the defendant has already failed to appear. I would therefore recommend forfeiting bail in those circumstances. However, a court cannot be faulted if it chooses to not forfeit the bail.

The second question that you posed is related to the practice on finders checks. The conclusions are generally the same in this area, with a few twists. The setting of bail is a judicial function. Therefore, although the statute requires the court to reduce the bail by the amount of the finders check, the judge ultimately has the authority to determine the appropriate bail. The judge could technically reduce the bail as directed in the statute, but could then immediately increase the bail based on the defendant's inattentiveness to the case. The court can therefore set the bail at an amount that it feels appropriate, despite any payments under the finders program.

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efficient, and independent system for the advancement of justice under the law.**

In the situation that you have described, the court will receive a check in a mandatory appearance case and then hold on to the money, as bail, while the warrant remains outstanding. The argument for retaining the cash bail in this circumstance is stronger than in the first circumstance, because the court's authority to immediately forfeit the bail is somewhat questionable. As stated, bail is posted to guarantee a defendant's appearance and may be forfeited when the defendant has failed to appear. It is questionable whether a court can forfeit bail that is posted after a defendant's failure to appear. The court would be required to retain the bail until there was an additional failure to appear. If there is an additional failure to appear, the court would be free to forfeit the cash as bail.

As a final note, it is my opinion that a court must be careful in reducing the amount of bail on a warrant under the finders program. As you noted, if the court continually reduces the bail, the warrant may eventually have no bail amount. A warrant in this circumstance would lose much of its effectiveness. If anything, a court may be inclined to increase the amount of bail if a defendant is repeatedly having his or her tax refunds sent to the court, while remaining unresponsive to the charges that are pending. The court's goal is not necessarily to collect the money, but to resolve the charges. Increasing the bail may be the best means of ensuring the appearance of the defendant.

If you have any questions about this opinion, please let me know.